REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 116 OF 2017

KENYA CATHOLIC SEMINARY COMMISSION.....1ST APPELLANT

PAUL MALALA NAWATT.....2ND APPELLANT

VERSUS

MUSA OMUMIA RAKAMA(*suing as Administrator and Legal*

***Representative of the Estate of the* EVERLINE ONYANGO OGADA....PLAINTIFF**

J U D G M E N T

1. The respondent herein had sued the appellants at the lower court seeking for general and special damages under the Law Reform Act(cap 26 Laws of Kenya) and under the Fatal Accidents Act (cap 32 of the Law of Kenya) after the respondent's wife was killed in a road traffic accident involving the appellants' motor vehicle. The trial magistrate found both the appellants jointly 100% liable for the accident and awarded damages as follows:-

General damages	- Kshs .1,332,000
Special damages	- Kshs. 90,330
Less loss of expectation of life	- Kshs. 150,000
Total	**Kshs. 1,272,330/=**

2. The appellants were aggrieved by the decision of the learned trial magistrate on both liability and quantum and lodged this appeal. The appeal raised grounds as hereunder:

1. The learned trial magistrate grossly misdirected herself in treating the evidence and submissions on liability before her superficially and consequently coming to a wrong conclusion on the same.

2. The learned trial magistrate did not in the alternative consider or sufficiently consider the demand of contributory negligence based on the evidence adduced and the submissions filed by the appellants.

3. The learned trial magistrate grossly misdirected herself in treating the evidence and submissions on quantum before her superficially and consequently coming to a wrong conclusion on the same.

4. The learned trial magistrate misdirected herself in ignoring the principles applicable and the relevant authorities cited in the written submissions presented and filed by the appellants.

5. The learned trial magistrate erred in not sufficiently taking into account all the evidence presented before her in totality and in particular the evidence presented on behalf of the appellants.

6. The learned trial magistrate erred in failing to hold that the respondent had failed to prove negligence on the part of the appellants while the onus of proof lay with the respondent.

7. The learned trial magistrate proceeded on wrong principles when assessing the damages to be awarded to the respondent (if any) and failed to apply precedents and tenets of law applicable.

8. The learned trial magistrate erred in awarding a sum in respect of damages which was so inordinately high in the circumstance that it represented an entirely erroneous estimate vis – a vis the respondent's claim.

9. The learned trial magistrate failed to apply judicially and to adequately evaluate the evidence and exhibits tendered and thereby arrived at a decision unsustainable in law.

The Evidence

3. The respondent stated that he did not witness the accident. He however called one eye witness, Pw2. It was the evidence of Pw2 that on the material day at 5 pm he was walking from Matungu market heading toward Ejinga on the general direction of Busia. That a motor cycle passed him heading towards Busia direction. He then saw a motor vehicle coming from Busia direction heading towards Matungu at high speed. That a dog emerged from the side of the motor vehicle. The driver tried to avoid it and swerved towards the lane of the motorcycle and hit it. The cyclist and his pillion passenger fell on their left side of the road. He blamed the driver of the motor vehicle for the accident.

4. The defence called one witness, the driver of the motor vehicle, the 2nd appellant. His evidence was that on that day at 7 pm he was driving towards Matungu . When he was near the market he saw a motorcycle coming from the oppose direction. A dog then emerged from the side of the road of the motorcyclist and was crossing the road. When the cyclist saw it he swerved to avoid the dog and rammed onto the left hand side of his motor vehicle. The cyclist fell into a ditch on the motor vehicle's side of the road. He blamed the motor cyclist for occasioning the accident.

5. The respondent stated in his evidence that his wife died at the age of 44. That she was a mother of 6 children, three of whom were minors at the time of death. That she was a businesswoman and a tailor. She was earning Kshs. 15,000/- a month. That he conducted a search with the Registrar of Motor Vehicles and found that the vehicle was registered in the name of the 1st appellant. The police abstract indicated that the 2nd appellant was the owner of the vehicle. He sued the two parties.

6. In his evidence in court the 2nd appellant stated that his father had bought the vehicle from the 1st appellant.

Submissions

7. The appeal is both on liability and quantum. The appellants fault the trial court for failing to hold that the respondent had not proved negligence on the part of the appellants and in the alternative for failing to consider the demand for contributory negligence. The advocates for the appellants **L.G. Menezes & Co. Advocates**, submitted that the 1st appellant was only the registered owner of the vehicle but not the beneficial owner or the insured who was the 2nd appellant. Therefore that the case against the 1st appellant should be dismissed as he was only a registered owner.

8. That there was no evidence that the 2nd appellant was under the authority , control and or command of the 1st appellant for them to be vicariously liable. That the respondent did not adduce any evidence connecting the 1st appellant to the 2nd appellant. That there was thereby no evidence than the 1st appellant was vicariously liable for the negligence of the 2nd appellant. Therefore that the ground than the 1st appellant was vicariously liable should fail.

9. It was further submitted that the evidence of the driver of the motor vehicle DW1 showed that it is the motor cyclist rider who was to blame for the accident. That the said rider did not produce a driving licence. Both the rider and the pillion passenger were not wearing helmets. Therefore that both the rider and the deceased were contributorily responsible for the accident.

10. Further that there was no evidence from the police as to who was to blame for the accident. That the rider of the motor cycle did not testify in the case. Therefore that the magistrate did not consider the evidence in its totality to make a finding on liability.

11. The advocates for the respondent, **M/s Mukisu & Co. Advocates**, submitted that the deceased herein was a pillion passenger. There was no evidence that she contributed to the accident. That the appellants did not enjoin a third party in the case. Further that the 2 nd appellant was the driver of the accident motor vehicle which fact was admitted driving the hearing. That he therefore cannot escape liability.

12. On quantum, the advocates for the appellants submitted that the deceased died on the same day of the accident. That the magistrate awarded Kshs. 30,000/= and failed to consider their authority in the case of **Charles Masoso Barasa & Another Vs Chepkoech Rotich & Another (2014) eKLR** where the court had awarded Kshs. 15,000/= for pain and suffering. They urged the court to award Kshs. 20,000/= under this category.

13. The advocates submitted that the award of Kshs. 150,000/= for loss of expectation of life was excessive. They urged the court to award Kshs. 80,000/= as awarded in the above cited case.

14. It was submitted that though the trial court rightly found that there was no evidence to prove the income of the deceased, there was no basis of adopting an income of Kshs.9000/=. That the Regulation of Wages (General)(Amendment) Order that was prevailing at the time was the 2015 order since in 2016 there was no wages order passed by the government. That the 2017 order could not work respectively. That under the 2015 order the minimum wage was Kshs. 5884/=.The advocates urged for a multiplicand of kshs.5884/- and a multiplier of 14 years.

15. The advocates for the respondent submitted that the deceased herein was married and left behind a husband and 6 children as dependents. That the figure of 9000/= used by the trial court as the minimum wage was reasonable in all the circumstances of the case.

16. Further that the trial court took into consideration all the relevant factors in assessing quantum as per the set down principles of law. That the appellants have not demonstrated that the awards as made by the trial magistrate was inordinately high. They urged that the appeal be dismissed with costs.

Determination

17. This is a first appeal .The duty of a first appellate court was explained in the case of ***KIRUGA V KIRUGA & ANOTHER [1988] KLR 348,*** where the Court of Appeal observed that;

> *"An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but this is a jurisdiction which should be exercised with caution."*

The questions before the court are:

1. Whether the learned trial magistrate erred in her finding on liability.

2. Whether the trial magistrate erred in arriving at her decision on quantum of damages.

Question of liability

18. The 1st applicant denied that they were the owners of the accident motor vehicle. Section 8 of the Traffic Act cap 405 provides that:

> *"The person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owners of the vehicle."*

An elaboration of this provision was made in **Charles Nyambuto Mageto Vs Peter Njuguna Njathi(2013) eKLR** where it was held that :-

> *"From the interpretation of Section 8 of the Traffic Act as elucidated above, a person claiming or asserting ownership need to necessarily produce a log book or a certificate of registration. The courts recognize that there are various forms of ownership, that is to say, actual, possessory and beneficial, all of which may be proved in other ways, including by oral or documentary evidence such as the Police Abstract Report even, as held in the Thuranira and Mageto cases (supra) that the Police Abstract Report is not, on its own, proof ownership of a motor vehicle. If, however there is other evidence to corroborate the contents of the Police Abstract as to the ownership, then, the evidence in totality may lead the court to conclude on the balance of probability that ownership".*

19. In this case the 2nd appellant admitted that the motor vehicle had been sold to his father by the 1st appellant. The police abstract indicated the owner of the vehicle as the 2nd appellant. This coupled with the oral evidence of the 2nd appellant proved that the 2nd appellant was the owner of the vehicle. I therefore hold that the 2nd appellant was the owner of the vehicle at the time of the accident.

20. The parameters for vicarious liability were set out in the case **of Tabitha Nduhi Kinyua Vs Francis Mutua Mburi & Another CA 180 OF 2009(2014) eKLR** where the court stated that:-

> *"The principle of vicarious liability is an anomaly in our law because it imposes strict liability on an employer for the delict of its employee in circumstances in which the employer is not itself at fault. An employer will be held to be vicariously liable if its employer was acting within the course and scope of employment at the time the delict was committed. The test for establishing whether an employer is vicariously liable for his/her servant's negligence was set out in this court's decision on Joseph Cosmas Khayigila V Gigi & Company Ltd & another -CA 119/86 as follows:- In order to fix liability on the owner of a car for the negligence of the driver, it was necessary to show either that the driver was the owner's servant or that at the material time the driver was acting on the owner's behalf as his agent. To establish the existence of the agency relationship, it was necessary to show that the driver was using the car at the owner's request, express or implied, or on his instructions and was doing so in the performance of the task of duty thereby delegated to him by the owner."*

21. In this case there was no proof of master and servant relationship between the two appellants. It was proved that the 2nd appellant was the owner of the motor vehicle independent of the 1st appellant. The 1st appellant was not thereby vicariously liable for the acts of the 2nd appellant regarding the material accident.

22. The 2nd appellant blamed the motor cyclist for occasioning the accident. A witness for the respondent PW2 blamed the 2nd appellant for being responsible for occasioning the accident. The 2nd appellant said that the motor cyclist hit his vehicle on the left side body. If the motor cyclist had left his lane and swerved on the lane of the motor vehicle, how come that the vehicle was hit on the left side body? If the cyclist is the one who swerved to his right, he would have hit the vehicle on the right side body. The fact that the motor vehicle was hit on the left side body is a clear indication that it is the motor vehicle that swerved on the lane of the motor cycle and the motor cycle hit the vehicle on the left side body.

23. The 2nd appellant blamed the motor cyclist for occasioning the accident. However the 2nd appellant did not enjoin the cyclist as a third party in the case. The deceased was a pillion passenger at the time of the accident. No evidence was adduced to prove contributory negligence of her part. The deceased was not to blame for the accident. It is the 2nd appellant who was entirely to blame for occasioning the

accident. I find him 100% liable for the accident.

Quantum

24. The court of Appeal in **Bashir Ahmed Butt Vs Uwais Ahmed Khan (1982 -1988) KAR** set out the parameters under which an appellate court will interfere with an award in general damages when it held that :-

> " *An appellate court will not disturb an award for general damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low.……..."*

25. It is the appellant's submission that the learned trial magistrate erred in awarding a sum in respect of damages which was so inordinately high in the circumstances that it represented an entirely erroneous estimate of the respondent's claim.

26. The deceased in this case died on the same night of the accident but must have underwent immense pain for hours before she died. I am persuaded that the sum of Kshs. 30,000/- awarded for pain and suffering is not excessive nor has it been shown to be erroneous or unreasonable. I find no reason to fault the award under this head.

27. Our courts have at most times awarded a conventional sum of Kshs. 100,000/= for loss of expectation of life. It is my considered view that the award of Kshs. 150,000/= was inordinately high under this heading. I substitute the award with one of Ksh. 100,000/-.

28. The deceased died at the age of 44 years. Counsel for the appellants urged the court to adopt a multiplier of 14 years. The trial magistrate adopted a multiplier of 16 in her calculations. However in her reasoning she adopted a multiplier of 14 years. It is my view that owing to uncertainties of life a multiplier of 14 years would have been reasonable.

29. The respondent testified that the deceased was a tailor and a businesswoman and that she was earning shs. 15000/- a month. The respondent did not produce any documents to prove the deceased's earnings. The Court of Appeal in **Job Ayiga Maruja & another Vs Simeon Obayo (2005) eKLR** held that:-

> " *We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earning is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things . "*

30. If however the deceased herein was a tailor it was easy to produce documents such as a business licence to prove the kind of work she was engaged in. I therefore find no evidence that the deceased was a tailor. The court cannot award damages for a tailor's job without evidence to prove so. In the absence of this the alternative for purposes of computing the deceased's earnings is to treat her as a general labourer.

31. The trial magistrate resulted to the use of the government's minimum wage to estimate the earnings of the deceased. Judgment in the case was delivered in October, 2017. If the deceased had been alive by then, the wages provided in The Regulation of Wages (General) Amendment) Order of 2017 that came into operation on 1st May 2017 would have been applicable to her. The minimum wage for a general labourer in that order is Kshs. 6896/=. I will apply that figure as the multiplicand. The dependency ratio was not contested. The award for loss of dependency comes to

6896 x 12 x 14 x 2/3 = 772,352.

32. The trial magistrate deducted the award for loss of expectation of life from the final award. She cited the Court of Appeal decision in **Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Menja (deceased) V Kiarie Shoe Stores Limited , Nyr CA Civil Appeal no. 22 of 2014 (2015) eKLR** where it was held that:

> '.. ***this court has explained the concept of double compensation in several decisions and it is surprising that some courts continue to get it wrong. The principle is logical enough; duplication occurs when the beneficiaries of the deceased's estate are the same, and consequently the claim for lost years and dependency will go to the same person. It does not mean that a claimant under the Fatal Accidents Act should be denied damages for pain and suffering and loss of expectation life as these are only awarded under the Law Reform Act , hence the issue of duplication does not arise''.***

The court re- stated what was held in **Kenfro Africa Limited t/a Meru Express Services 1976 & Another Vs Lubia & Another (1987) eKLR 30** that :

> ' *6.* ***An award under the Law Reform Act is not one of the benefits excluded from being taken into account when assessing damages under the Fatal Accidents Act; it appears the legislation intended that it should be considered.***
>
> ***7. The Law Reform Act (cap 26) section 2 (5) provides that the rights conferred by or for the benefit for the estates of deceased persons shall be in addition to and not in derogation of any of the rights conferred on the dependants of the deceased persons by the Fatal Accidents Act. This therefore means that a party entitled to sue under the Fatal Accidents Act still has the right to sue under the Law Reform Act in respect of the same death.***

***8. The words 'to be taken into account' and ' to be deducted' are two different things . The words in section 4(2) of the Fatal Accidents Act are 'taken into account'. The section says what should be taken into account and not necessarily deducted. It is sufficient if the judgment of the lower court shows that in reaching the figure awarded under the Fatal Accidents Act, the trial judge bore in mind or considered what he had awarded under the Law Reform Act for non – pecuniary loss. There is no requirement in law or otherwise for him to engage in a mathematical deduction*.**

33. In view of this authority there is no requirement to deduct the award made under Law Reform Act from the award made under the Fatal Accidents Act. I have taken into account the award made under the Law Reform Act when making the award under the Fatal Accidents Act.

34. The final award is thereby computed as follows:

Pain and suffering	– Kshs. 30,000/-
Loss of expectation of life	-Ksh. 100,000/-
Loss of dependency	– Kshs. 772,352/-
Special damages	- Kshs. 90,330/-
Total	Kshs. 992,682/-

35. In the foregoing liability is entered at 100% in favour of the respondent against the 2nd appellant. The suit against the 1st appellant is dismissed with no orders as to costs. Judgment is accordingly entered for the respondent against the 2nd appellant to the sum of **Kshs. 992,682**/-. The 2nd appellant to bear the costs of the appeal for the respondent.

Delivered, dated and signed in open court at Kakamega this 27th day of November, 2018.

J.NJAGI

JUDGE

In the presence of the:

Miss Odeny ……for appellants

N/A…….……for respondent

George ……court assistant

Parties:

1st appellant … Absent

2nd appellant ….Absent

Respondent ……Absent

Right of Appeal 14 days